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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

79-1346

FRANK MUNOZ, JR.,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Page

OPINION BELOW 1
JURISDICTION 1
QUESTIONS PRESENTED 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASON FOR GRANTING THE WRIT 17
I. THE TRIAL COURT'S FAILURE TO MENTION THE THEORY OF THE DEFENSE IN INSTRUCTING THE JURY NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION 17
II. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT III, WHERE THERE WAS NO EVIDENCE TO SUPPORT A FINDING OF GUILT, AND DEFENDANT'S CONVICTION FOR THE SAME NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION ON BOTH CHARGES AND REMAND FOR NEW TRIAL ON COUNT I 23
CONCLUSION 31
APPENDIX I
APPENDIX II

TABLE OF CITATIONS

Cases: Page

Hendry v *United States*, 233 F5 (6th Cir, 1916) 20-21

Jackson v *Virginia*, US , 99 S Ct 2781, 61 LEd2d 560 (1979) 29-30

Nye v *Nissen*, 336 US 613; 69 S CT 766; 93 LEd 919 (1949) 25

Murray v *United States*, 403 F2d 694 (9th Cir, (1968) 27-28, 28-29

Tatum v *United States*, 190 F2d 612 (D.C. Cir, 1951) 20

United States v *Bethea*, 442 F2d 790 (D.C. Cir, 1971) 29

United States v *Blane*, 375 F2d 249 (6th Cir, 1967) .. 18

United States v *Collin*, 426 F2d 939 (6th Cir, 1970) . 24-25

United States v *Conti*, 339 F2d 10 (6th Cir, 1964) ... 24

United States v *Bryant*, 461 F2d 912 (6th Cir, 1972) . 26

United States v *Epperson*, 485 F2d 514 (9th Cir, 1973) 27

United States v *Flores*, 564 F2d 717 (5th Cir, 1977) .. 26

United States v *Garner*, 529 F2d 962 (6th Cir, (1976) 18-19, 22

United States v *Hall*, 552 F2d 273 (9th Cir, 1977) ... 22

United States v *Longoria*, 569 F2d 422 (5th Cir, 1978) 26-27

United States v *Martinez*, 555 F2d 1269 (5th Cir, 1977) 25

United States v *Moore*, 546 F2d 657 (5th Cir, 1977) . 27

United States v *Pritchard*, 458 F2d 1036 (7th Cir, 1972) 22

United States v *Rojas*, 537 F2d 216 (5th Cir, 1976) cert, denied 492 US 1061, 97 S Ct 758, 50 LEd 777 (1977) 27

United States v *Van Buren*, 568 F2d 607 (8th Cir, 1978), cert. denied 435 US 932, 98 S Ct 1506, 55 LEd2d 529 (1978) 31

TABLE OF CITATIONS (Cont'd)

Page

Constitutional Provision:

United States Constitution, Amendment V 2, 30

Statutory Provisions:

United States Code, Title 18, Section 2 ..... 2-3, 25

United States Code, Title 21, Section 841(a)(1) 3, 25

Other Authority:

2 Wright's Federal Practice and Procedure (1969), Criminal Law of, §463..... 24

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FRANK MUNOZ, JR.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, FRANK MUNOZ, JR., respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 6, 1979 and January 22, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals, not reported, appear in the Appendix attached hereto (App I 2a-3a).

JURISDICTION

The Order of the Court of Appeals affirming the District Court judgment was entered on December 6, 1979. The Order of the Court of Appeals denying the petition for rehearing was entered on January 22, 1980. Petitioner's Application For Extension of Time within which to file this Petition for Certiorari was filed on February 19, 1980. By Order dated February 21, 1980, the Supreme Court extended time for filing a Petition to and including March 6, 1980. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S FAILURE TO MENTION THE THEORY OF THE DEFENSE IN INSTRUCTING THE JURY NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION.

II. WHETHER THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT III, WHERE THERE WAS NO EVIDENCE TO SUPPORT A FINDING OF GUILT, AND DEFENDANT'S CONVICTION FOR THE SAME NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION ON BOTH CHARGES AND REMAND FOR NEW TRIAL ON COUNT I.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Section 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or produces its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, Title 21, Section 841(a)(1):

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

The Charges

Petitioner, FRANK MUNOZ, JR., was charged by a Federal Grand Jury along with Dennis McCorquadale, Kurt M. Murdzia, Robert J. Pesci, and Catherine J. Anthos with conspiracy to manufacture and distribute phencyclidine (Count I), and, along with Pesci and Anthos, with possession with intent to distribute phencyclidine (Count III), in violation of 21 USC 846, 841(a)(1).

The three co-defendants entered pleas of guilty; Petitioner went to trial.

The Prosecution's Case

In his case-in-chief, the prosecutor presented nine witnesses.

The first prosecution witness was Agent Thomas Powell, who was the officer in charge of the case (T II 45).[1] Agent

[1] Transcript citations are as follows:
T I indicates trial proceedings transcribed on November 30, 1978
T II indicates trial proceedings transcribed on December 6, 1978
T III indicates trial proceedings transcribed on December 7, 1978
T IV indicates trial proceedings transcribed on December 8, 1978
T V indicates trial proceedings transcribed on December 12, 1978
T VI indicates trial proceedings transcribed on December 13, 1978

Powell's testimony indicated that on December 21, 1977, he was working in an undercover capacity and met Dennis McCorquadale (T II 45-46). Agent Powell talked to McCorquadale about purchasing an ounce of PCP (T II 52-53). Agent Powell then followed McCorquadale to his apartment and purchased an ounce of PCP with $600 of official government funds (T II 53-55). Agent Powell talked to McCorquadale about purchasing larger quantities of PCP and McCorquadale gave Agent Powell his telephone number (T II 55).

Sometime later Agent Powell contacted McCorquadale about purchasing more PCP and McCorquadale said there was only an ounce or two left (T II 58-59). McCorquadale explained to Agent Powell that his suppliers had run out of a particular chemical (T II 58). After several conversations, Agent Powell told McCorquadale that he knew someone who worked at a chemical company and could obtain the needed chemical (T II 59). On February 8, 1978, Agent Powell brought McCorquadale a sample of the chemical in a glass vial and a Polaroid photograph of the can containing the chemical. (T II 59-60).

After more conversation, McCorquadale agreed to give Agent Powell $2,500 as a surety, to supply him with one pound of PCP, and to allow him to meet his supplier (T II 60-61).

On February 13, 1978, Agent Powell and Agent Brightwell, described as the employee of a chemical company, met with McCorquadale and Kurt Murdzia at a restaurant (T II 62-63). At the restaurant, the agreement was discussed and it was further agreed Agents Powell and Brightwell would deal directly with McCorquadale (T II 63-64).

On February 15, 1978, Agents Powell and Brightwell supplied McCorquadale with a can of the chemical (T II 16). The can contained a false bottom with a special transmitting device which produced a tracking signal (T II 65).

Later on February 15, 1978, the signal was detected at the residence of Murdzia (T II 66). Two days later on February 17, 1978, the signal was detected at a mobile home. (T II 66-67).

From February 17-19, 1978, the mobile home was placed under periodic surveillance (T II 70-71). On February 19, 1978, Agent Powell saw Robert Pesci drive up to the mobile home, park, check the mail, and enter (T II 71).

From February 19-23, 1978, Agent Powell maintained contact with McCorquadale and conducted surveillance of Pesci (T II 71-72). At approximately 10:00 A.M. on February 23, 1978, Agent Powell followed Pesci to the mobile home and stayed to watch (T II 72). At approximately 1:30 P.M. defendant drove up to the mobile home (T II 76). Agent Powell testified that defendant went into the trunk of his car, got something out, and took it into the mobile home (T II 76). Agent Powell testified that he could not see what defendant allegedly took into the mobile home because defendant had his back to him (T II 76).

Sometime later, Pesci left the mobile home, drove to a hardware store, and returned carrying some articles in a shopping bag (T II 77). Approximately 40 minutes later, defendant left the mobile home and returned about an hour later (T II 77-78). A short time later, Pesci and defendant came out of the mobile home and got into defendant's car (T II 78). Agent Powell testified that while leaving, defendant was facing him; had his coat wide open; had a paper bag in his hand; was looking left and right; and then concealed the paperbag under his coat (T II 78-79). After defendant and Pesci drove away, Agent Powell approached the mobile home and smelled a very pungent chemical odor (T II 79-80). Sometime later, Catherine Anthos returned to the mobile home (T II 81).

Agent Powell went to a restaurant and saw Pesci and defendant there (T II 81-82). Agent Powell then ordered arrests and obtained a search warrant for the mobile home

(T II 82). Agent Powell, other agents, and a chemist searched the mobile home (T II 82).

The mobile home contained four main rooms—a living room, a kitchen, a bathroom, and a bedroom, (T II 83). In the bathroom, there were the chemical can which had been supplied by the agents and two pails and coffee filters which contained a substance (T II 85-86). In the bedroom, there were a pail with a substance, a balance scale, a Pyrex dish, a fork, a mixing bowl, and plastic baggies (T II 86). In the kitchen, a jar containing PCP was found in the refrigerator (T II 86-87).

On cross-examination, Agent Powell testified that neither McCorquadale nor Murdzia mentioned defendant prior to February 23, 1978 (T II 142), and that neither he nor other agents had seen defendant at the mobile home before February 23, 1978 (T II 139). Agent Powell also testified that the mobile home was owned by Pesci and Catherine Anthos (T II 138-139). Agent Powell testified that the jar in the refrigerator was dusted for fingerprints and defendant's fingerprints were not found on it (T II 176). Agent Powell testified that the refrigerator was working and the door to it was closed (T II 175).

The second prosecution witness was Agent William Isenhour (T II 188). Agent Isenhour was involved in surveillance, tracking, arrest, and search (T II 188-196).

On cross-examination, Agent Isenhour testified that on February 23, 1978, he was on air surveillance and used binoculars (T II 198). Agent Isenhour testified that he saw defendant arrive at the mobile home (T II 198-199). Agent Isenhour took notes, but made no note of defendant taking any item from his trunk and carrying it into the house (T II 199).

The third prosection witness was Agent William Modestit (T III 5). Agent Modestit was involved in the surveillance and arrest on February 23, 1978. At approximately 1:40

P.M., Agent Modestit followed Pesci from the mobile home to a hardware store where he saw Pesci buy a strainer and coffee filters (T III 5-7). At approximately 3:45 P.M., Agent Modestit saw Pesci and defendant arrive and enter a restaurant (T III 8). Later at approximately 4:40 P.M., Agent Modestit saw Murdzia and a woman arrive and enter the same restaurant (T III 9-10). Approximately 20 minutes later, all four individuals left the restaurant (T III 10). Pesci and defendant proceeded to their car, and Murdzia and the woman followed Pesci to the passenger side of the car (T III 10-11). Pesci bent down beside the car and Murdzia walked away from the car with a paper bag (T III 11). Murdzia and the woman went to their car and drove away from the restaurant (T III 11-12). Shortly thereafter, Agent Modestit arrested Murdzia and the woman and found the paper bag to contain PCP (T III 12-13).

On cross-examination, Agent Modestit testified that no request was made to check the paper bag for fingerprints (T III 31).

The fourth prosecution witness was agent Will Garrett (T III 29).

Agent Garrett was involved in surveillance at the restaurant with Agent Modestit on February 23, 1978. Agent Garrett corroborated the testimony of Agent Modestit, adding that he saw Pesci hand the paper bag to Murdzia (T III 31).

On cross-examination, Agent Garrett testified that defendant had no contact with the paper bag (T III 33). Agent Garrett also testified that he had defendant under surveillance earlier on February 23, 1978 (T III 34). Agent Garrett testified that in the early afternoon, he followed defendant from the mobile home to a school where he picked up and dropped off a child (T III 35-36). Agent Garrett further testified that he was involved in the arrest of Murdzia and the woman (T III 37-38). Agent Garrett testified that he had not seen the woman do anything and indicated that the

woman was arrested and fingerprinted, but not processed further (T III 38-39).

The fifth prosection witness was admitted conspirator Robert Pesci (T III 62). On direct examination, Pesci testified that on February 22, 1978, defendant called and asked to meet at the mobile home (T III 62). Pesci testified that on February 23, 1978, he went to the mobile home and defendant arrived sometime later with a pail of paste (T III 63-64). Pesci testified that defendant left to pick up his child and that Pesci bought some items and filtered the paste (T III 64). Pesci testified that he called Murdzia to set up a meeting at a restaurant and that he then asked defendant to drive him to the restaurant (T III 64-64). Pesci testified that PCP was supposed to be given to Murdzia at the restaurant (T III 66).

Pesci testified that he and defendant "just fell into something that neither one of us knew anything much about" (T III 67). Pesci testified that his friend Dennis Reid had gotten into trouble, was going to jail, and needed help to make some money (T III 67). Pesci testified that Reid came up with a plan to make PCP which could make them both some money (T III 67). Pesci testified that he told defendant about the idea and that defendant did not like it (T III 68). Pesci claimed that defendant got involved later and that he, Murdzia, and defendant were involved (T III 67-73). Pesci testified that Reid was already in jail, but told them how to make PCP (T III 72-74).

Pesci claimed that defendant gave the paper bag to Murdzia at the restaurant (T III 74-75).

Pesci testified that in exchange for his testimony against defendant, he was permitted to plea guilty and receive a prison sentence of 5 years and a parole of 10 years, and the prosecution would drop a 25 year charge as a dangerous drug offender (T III 76-79). Pesci testified that he had previously been convicted of armed robbery, hijacking, and heroin (T III 79).

Pesci testified that he and Murdzia were good friends and had previously dealt with PCP (T III 79). Pesci testified that he had previously obtained PCP from Reid and that defendant was not involved in the matter (T IV 79-80).

On cross-examination, Pesci testified that he knew defendant since 1969 or 1970 and had met defendant in connection with a trucking business (T III 86). Pesci testified that he and his son were hauling machines and supplies without any authority and that defendant leased his authority to them so they could legally do hauling (T III 87). Pesci testified that the authority was very important and business could not be carried on without it (T III 87). Pesci testified that in order to properly maintain the authority, he and his son had to meet requirements involving insurance, license plates, and other matters (T III 88). Pesci testified that he and defendant had to meet on occasion to discuss the authority (T III 88). Pesci also testified that his son had some problems with properly maintaining the insurance requirements and that defendant was involved in straightening out the problems (T III 98-99).

Pesci testified that about a week ago, he learned defendant had taken the authority from his son and placed it into reserve (T III 96). Pesci admitted that he was upset and disappointed with defendant for taking the authority from his son (T III 96).

Pesci testified that last Thursday or Friday he reached an agreement with the prosecution and plead guilty (T. III 88). Pesci testified that he was aware the prosection had a dangerous drug offender charge hanging over him (T. III 91). Pesci testified that his own lawyer told him the charge carried 45 years in prison, but that he later learned it carried 25 years in prison (T III 95). Pesci testified that the prosection was going to drop the charge only if defendant plead guilty (T III 91). Pesci testified that at the time of his plea, he thought defendant was going to plead guilty and that Pesci was only going to receive 6 years in prison (T III 91). Pesci testified that he even telephoned defendant and begged him

to plead guilty (T III 96-97, 112). Pesci testified that when defendant would not accept a guilty plea, he made an agreement with the prosecution to testify against defendant in exchange for dropping the danger drug offender charge (T III 107).

Pesci reiterated that he and Kurt Murdzia had previously been involved with PCP and that defendant had nothing to do with it (T III 97). Pesci also reiterated that defendant nixed Dennis Reid's plan to make PCP upon first hearing it (T III 97). Pesci testified that defendant had met Reid through him (T III 97-98).

Pesci testified that he and Catherine Anthos owned the mobile home, but that she resides there (T III 89). Pesci testified that Catherine Anthos was his girlfriend and that he saw her two or three times a week (T III 89). Pesci testified that he did not know about the PCP in the jar in the refrigerator until he was told by the Agent (T III 88-89). Pesci testified that defendant did not know about the PCP in the refrigerator "because I didn't know nothing about it at the time" (T III 90). Pesci testified that defendant did not have a key to the mobile home (T III 104). Pesci testified that the mobile home cost $6,000.00 and that he and Catherine Anthos each paid $3,000.00 (T III 99). Pesci testified that Catherine Anthos was 20 years old and unemployed at the time (T III 99).

The sixth prosecution witness was admitted conspirator Kurt Murdzia (T. III 123). Murdzia's testimony indicated that he got PCP from Pesci and sold it to McCorquadale (T III 125). Murdzia testified that McCorquadale introduced him to Agent Powell (T III 124). Murdzia corroborated Agent Powell's testimony about the initial sale of PCP, the agreement to obtain the chemical, and the transfer of PCP which resulted in his arrest (T III 125-126, 129-133). Murdzia testified that Pesci gave him the paper bag containing PCP at the restaurant (T III 132-133). Murdzia also testified that at an unspecified date, he met Pesci and defendant was with Pesci (T III 126-127). Murdzia testified that he and

Pesci talked about obtaining the chemical from Agent Powell (T III 127). Murdzia testified that defendant said "the only person who could get that can was DEA and he didn't like it, and he wanted out" (T III 128). Murdzia testified that in exchange for his testimony, he was allowed to plead guilty and receive a maximum of two years in prison and two years on parole (T III 134).

On cross-examination, Murdzia testified that the prosecutor was also going to write a letter to the sentencing judge and parole board recommending early release (T III 164). Murdzia testified that he and Pesci dealt in PCP about ten times and that defendant had not been involved in any of the prior dealing (T IV 11-12). Murdiza also testified that after the chemical was transferred to the mobile home, Pesci told him he (Pesci) was having trouble making the PCP (T IV 16-17).

The seventh prosecution witness was chemist Roger Fuelster (T IV 30). Chemist Fuelster's testimony indicated that he was involved in the search of the mobile home and analysis of substances found in it. Chemist Fuelster testified that the substances found in the bathroom and bedroom consisted of Cyclohexanone, Piperidine, and an unknown substance (T IV 33-37). Chemist Fuelster further testified that the substance in the paper bag, which was taken from Murdzia upon arrest, consisted of Cyclohexanone, Piperidine, and an unknown substance (T IV 48-49). On the other hand; Chemist Fuelster testified that the substance in the jar in the refrigerator consisted of PCP, Hydrochloride, and reaction-by-products (T IV 50-51).

The eighth and ninth prosecution witnesses were Agents Charles Klyck and Robert Brightwell, who were involved in the surveillance and arrest of the defendant, respectively. (T VI 81-82; 84-86).

Motion For Directed Verdict

At the close of the prosecutor's case-in-chief, defense counsel made a motion for directed verdict (T IV 90) with

respect to Count III, involving possession of PCP found in the refrigerator. Defense counsel argued that there was no evidence linking defendant to the contraband (T IV 90). Defense counsel pointed out admitted conspirator Pesci testified that neither he nor defendant knew about the PCP in the refrigerator (T IV 90-91). Defense counsel also pointed out that the jar was not in open view (T IV 97). In response, the prosecutor claimed that there was circumstantial evidence to infer that defendant had dominion and control over the jar in the refrigerator (T IV 93-95). The trial judge denied counsel's motion (T IV 98-100).

The Petitioner's Case

The first defense witness was Agent Thomas Powell (T V 20). Agent Powell testified that Count III of the indictment involved the PCP in the refrigerator (T V 23). Agent Powell testified that on three occasions prior to trial he had conversations with Pesci (T V 21). Agent Powell testified that Pesci had stated that he had nothing to do with the PCP in the refrigerator (T V 26).

The second defense witness was Investigator Nick Medvecky (T V 27). Nick Medvecky testified that he went to the location of the mobile home, made measurements, and took photographs (T V 27). Nick Medvecky testified that from Agent Powell's position and direction, it was physically impossible for a person to see the entrance of the mobile home at a distance of 75 to 100 yards (T V 36). Nick Medvecky testified that a person could not even see the entrance of the mobile home from 17 yards away (T V 36).

Nick Medvecky also introduced a National Weather Service Climatological Report for February 23, 1978, which indicated sky cover, fog, smoke, haze, amount of snow on the ground, total snow fall for the day, and hours of snow fall (T V 38).

The third defense witness was defendant Frank Munoz, Jr. (T V 40). Defendant testified that he was born and raised

in Detroit and was 49 years old (T V 41). Defendant testified that he was married and had three boys and two girls (T V 41). Defendant testified that he operated and leased tractors and trailers (T V 41). Defendant testified that he had been involved with trucking since he got out of the military service in 1956 (T V 41-42). Defendant testified that he served two years in the military in Europe as a military police officer (T V 42). Defendant testified that he was of Mexican descent, being born in the United States and his parents being born in Mexico (T V 42). Defendant testified that he helped start and worked the Hispanic Organization to Promote Engineers (H.O.P.E.), which was a program to aid Spanish speaking people in business matters (T V 49).

Defendant's testimony showed that he first met Pesci when Pesci came home from prison (T V 50). Defendant helped Pesci get a job with a trucking firm (T V 50). Defendant said that he was aware Pesci had a criminal record, but that he knew several people who had criminal records because he grew up in a rough neighborhood (T V 50). Defendant testified that he had been charged for making a false statement and plead guilty to the charge in 1975 (T V 50-51).

Defendant's testimony showed that he occasionally saw Pesci over the next three or four years. In 1974 or 1975, Pesci came to him and asked for some help (T V 53). Defendant had a Michigan Public Service Commission Permit to operate vehicles within Detroit and Pesci wanted to use it (T V 53). Defendant allowed Pesci to use the permit and they began to see each other more frequently (T V 53-54). In return, Pesci helped defendant get financing for equipment because defendant's business was in trouble and his credit was bad in 1975 (T V 54-55).

Defendant testified that Pesci talked with him about making PCP (T V 55-56). Defendant testified that he told Pesci he wanted nothing to do with it (T V 56). Sometime later, defendant and Pesci were at a restaurant and were joined there by Kurt Murdzia (T V 57). Defendant testified

that he did not know Murdzia was going to be present (T V 57). Defendant testified that Pesci and Murdzia began talking about PCP and that he got a little disturbed and did not participate in the conversation (T V 57-58).

Defendant testified that he continued to see Pesci to talk business (T V 58). Defendant testified that Pesci was having some problems with maintaining the insurance requirements on the permit and that they agreed to meet at the mobile home to talk about the problems (T V 58-60). Defendant testified that he had dropped off Pesci at the mobile home a couple of times before (T V 60).

Defendant's testimony showed that on February 23, 1979, he arrived at the mobile home around 1:30 P.M. (T V 61-62). Defendant brought a clipboard to take some notes (T. V 63). Defendant sat in the living room and started talking with Pesci, but Pesci said he had to go someplace (T V 64). Defendant said he did not have much time and Pesci promised he would be right back (T V 64-65). Pesci returned approximately 20 minutes later (T V 65). Defendant told Pesci he had an appointment at 2:30 P.M. and Pesci asked him to return (T V 65). Defendant agreed because they had not accomplished anything (T V 65-66). Defendant picked up his daughter and met with a priest about her first Holy Communion (T V 65-66). Defendant then returned to the mobile home to see Pesci (T V 66).

Defendant testified that upon entering, he smelled an unusual odor and asked Pesci what it was (T V 66-67). Pesci said that he was doing some experimenting and to not worry about the odor (T V 67). Pesci told defendant that he wanted to meet Kurt Murdzia and asked defendant to come along (T V 67). At first, defendant did not want to go, but then agreed to go because Pesci could not or did not want to move his car (T V 67-68). Defendant drove Pesci to a restaurant and waited with Pesci for Murdzia (T V 68). Murdzia arrived with a woman and the four had coffee and talked (T V 68). Defendant testified that there was not talk about PCP (T V 68). Defendant testified that he went to the counter and paid

the check (T V 68-69). Defendant testified that as he was getting into the car, he saw Pesci hand something to Murdzia on the passenger side of the car (T V 69). Defendant and Pesci were stopped and arrested going back to the mobile home (T V 70-71).

Father Clement H. Kern, who was a priest at Holy Trinity Church for 35 years (T V 95-96); Anthony R. Alvarez, who was community planner with the United States Department of Housing and Development (T V 99); Ralph Thorpe, who was a shop owner in Detroit (T V 101); Patrick Dwyer, who was a neighbor acquaintance (T V 105); Juan Trujillo, who was a co-worker in H.O.P.E. (T V 107); and Mitchell Alfaro, who was an architect (T V 109) all appeared on defendant's behalf and testified to their familiarity with defendant and his good reputation as a truthful man in the community.

Petitioner's Request To Charge and The Jury Charge

After closing argument, defense counsel submitted the following written theory of defense and requested the trial judge to give it in her instruction (T VI 17-20).

Theory of The Defense

It is the theory of the defense that there was a plan, a conspiracy to manufacture and distribute PCP, that the plan involved the participation of the following persons:

Dennis McCorquadale
Kurt Murdzia
Robert Pesci
Catherine Anthos
and

Agent Powell who supplied the necessary chemical, that Frank Munoz had no part in the scheme and in fact according to the two civilian prosecution witnesses that FM expressed his intention to have nothing

to do with the scheme; that at Pesci's request FM was simply driving Robert Pesci to an appointment Pesci had with Murdzia; that FM in no way participated in the venture but was merely present with knowledge that Pesci was involved with attempting to produce PCP; that FM was simply in the wrong place at the wrong time and was therefore arrested and charged; that Pesci was faced with conviction and a sentence of from 30-45 years unless Anthos and Munoz pied guilty and that when Munoz refused to plead guilty, Pesci and the prosecution made a deal whereby Pesci would plead guilty, testify against Munoz in exchange for limiting his sentence to five (5) years instead of thirty (30) years or more; that Frank Munoz is not guilty of Count I conspiracy to manufacture and distribute PCP and is likewise Not Guilty of Count III Possession of PCP with intent to deliver which was found in the refrigerator at the trailer.

Devitt at Blackman, Federal Jury Instructions Sec. 7.02.

The trial court refused to give the requested instruction, and made no mention of the theory of the defense in its charge to the jury (T VI 97-134).

The Verdict, Sentence and Appeal

The jury found Petitioner guilty of Count I and Count III (T VI 145).

On February 15, 1979, Petitioner was sentenced to concurrent terms of five (5) years in prison and two (2) years on special parole.

He appealed his conviction to the United States Court of Appeals for the Sixth Circuit, contending *inter alia* that the trial court's failure to dismiss Count III and failure to make any mention of the theory of the defense in its charge to the

jury constituted reversible error. The Sixth Circuit affirmed the convictions on December 6, 1979. Petitoner's request for rehearing on the above mentioned claims of error was denied by the Court of Appeals on January 22, 1980.

Petitioner now asks this Court to review those decisions.

REASON FOR GRANTING THE WRIT

I. THE TRIAL COURT'S FAILURE TO MENTION THE THEORY OF THE DEFENSE IN INSTRUCTING THE JURY NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION.

Defense counsel submitted a written theory of defense, and requested the trial judge to give it in her instruction (T VI 17-20; App II 4a-6a). The requested instruction is reproduced in the Statement of the Case, *supra*.

The trial judge indicated that she would be willing to give a short, succinct, non-argumentative theory for prosecution and defense "if you wish me to and could agree" (T VI 18; App II 4a). Defense counsel noted that his proposed instruction on the theory of defense was short (T VI 18; App II 4a).

The trial judge further indicated that she had no complaint about the length of the proposed instruction, but she thought that it contains many evidentiary references that "I really don't think is proper for the court to underscore on behalf of either party of the case" (T VI 18; App II 5a). Neither the trial judge nor the prosecutor stated that defense counsel's proposed instruction was not supported by the facts and law.

Defense counsel stated that he would be willing to consider deletions if the trial judge would point out specific portions which were unacceptable to her (T. VI 19; App II 5a). The trial judge stated the proposed instruction was argumentative without giving specifics and reiterated her refusal to give it (T VI 19; App II 5a). The trial judge stated

that it was defense counsel's burden to resubmit an acceptable instruction (T VI 19; App II 5a).

The trial judge did not make any mention of the theory of defense in her instructions (T VI 97-134).

The Sixth Circuit Court of Appeals, in affirming the conviction, held "that while it would have been better practice for the trial court to have given a short and concise statement of the defendant's claim to the jury as a separate instruction," failure to do so did not constitute reversible error. The Court reasoned that the requested instruction "tended to be argumentative" and that the substance of the defense theory was covered by the trial court in its instructions on mere presence at the scene and knowledge of the commission of a crime and on witness credibility (T VI 118; 124-126; App II 6a-8a).

Petitioner maintains that the trial court's failure to make any mention of the theory of defense in its charge to the jury constituted reversible error, and that the Court of Appeals erred in affirming the District Court judgment.

The well established federal law, and in particular that of the Sixth Circuit, is that it is reversible error in a criminal case for a trial judge to refuse to present *adequately* the defendant's theory of defense. A defendant is entitled to separate instruction regarding his theory of defense when such theory finds some support in the evidence and law. *United States* v *Blane*, 375 F2d 249, 252 (6th Cir, 1967); *United States* v *Garner*, 529 F2d 962, 970 (6th Cir, 1976) and cases cited therein.

In *United States* v *Garner, supra*, defense counsel requested a rather lengthy jury instruction containing a detailed factual outline of the theory of defense. The trial judge refused to read the instruction to the jury. Defense counsel asked whether any changes could be made in the proposed instruction to make it acceptable. The trial judge reiterated his refusal to read the instruction. In holding that the trial

court's failure to present defendant's theory of the case in its instruction was reversible error, the Court of Appeals stated:

> We have studied carefully the instructions given by the District Judge to the jury, and it is our opinion that the trial Judge should have presented Lorene Brown's theory of the case in his instructions to the jury. In a criminal case it is reversible error for a trial Judge to refuse to present adequately a defendant's theory of defense. *United States* v. *Blane*, 375 F.2d 249 (6th Cir), cert. denied, 389 U.S. 835, 88 S.Ct. 41, 79 L.Ed.2d 96, rehearing denied, 389 U.S. 998, 88 S.Ct. 459, 19 L.Ed.2d 503 (1967).
>
> The trial judge was not required to adopt the language suggested by a defendant in the Court's instructions to the jury; however, when a theory of defense finds some support in the evidence and in the law, a defendant is entitled to some mention of that theory in the instructions. *United States* v. *Swallow*, 511 F.2d 514 (10th Cir 1975). Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense. *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951).
>
> *Id.* at 969-670.

The Court of Appeals decision in the present case that the trial court's general instructions eradicated the requirement of instructing on the theory of the defense contravenes and nullifies that law previously enunciated by the Court.

The general instructions of law given by the trial court in this case with respect to mere presence and witness credibility neither adequately presented the theory of the defense to the jury nor sufficiently advised the jurors of the issues to be resolved by them in determining the defendant's innocence or guilt.

Unlike, the defendant's proposed theory of defense instruction, the general instructions given by the Court failed

to mention any facts presented by the evidence. On this basis alone the general instructions of law did not adequately apprise the jury of the theory of defense and suffice as a substitute for the requested instruction.

The purpose of giving a theory of defense instruction is to focus the jury's attention on those disputed propositions of fact which are presented by the evidence, and thereby enable the jury to apply the general principles of law, elsewhere set forth in the charge, to the particular facts of the case. Thus, by its very nature, such instruction is largely a factual statement. General instructions of law which make no reference to specific trial evidence, fail to present to the jury precisely that which a theory of defense instruction presents; namely, how those general principles of law apply to the particular factual disputes of the case.

The trial court's giving simply of general mere presence and witness credibility instructions, and failure to give any instruction regarding defendant's factual version of the case, deprived the defendant of a jury adequately instructed on the issues of the case, and constitutes reversible error.

In *Tatum* v *United States*, 190 F2d 612 (D.C. Cir, 1951), wherein the Court reversed and remanded the cause for failure of the trial court to give the defendant's requested theory of defense instruction, the Court stated:

> As we stated in *Williams* v. *United States*, 1942, 76 U.S. App. D.C. 299, 301, 131 F.2d 21, 23, trial by a jury of peers "is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind; if it does not know, with clear delineation, the issues upon which it is to pass judgment? *Id.* at 617.

Similarly, in *Hendry* v *United States*, 233 F 5 (6th Cir, 1916), the Court held that the general charge given by the trial judge did not sufficiently cover the defendant's requested instructions and therefore failed to protect his rights. The Court stated:

> We have often approved the practice of declining to give instructions which, though proper in themselves, would constitute mere repetitions, usually in less intelligible form, of subject-matter consecutively and logically treated in the general charge *but the respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense so that the jury may understand that theory and the essential rules applicable to it.*
>
> (Emphasis added). *Id.* at 18.

Here, the defendant's proffered theory of defense instruction was in no ways repetitious of subject-matter otherwise covered in the charge. The requested instruction was designed to convey to the jury exactly that which the general charge omitted: the synthesis between the evidence presented at trial and the defendant's assertion that he was innocent of the crimes charged.

Although expressing a contrary view at oral argument, the Court of Appeals in its written opinion found that the instruction offered by defense counsel "tended to be argumentative." For that reason, along with the general instructions given, the Court of Appeals held that the trial court's failure to make any mention of the theory of the defense did not constitute reversible error.

Petitioner maintains that by its very nature the theory of the defense will be somewhat argumentative because it is the position and view of an adversary. Defense counsel's proposed instruction was not so argumentative as to justify total exclusion. In excusing the trial court's failure to give the requested instructions, the Court of Appeals in effect erroneously adopted the prosecution's argument that because the proferred instruction set forth facts it was improper.

However, a reading of the case law discloses that what renders a requested theory of defense instruction so

argumentative as to justify its exclusion from the jury's consideration is not its citation of trial evidence, as was done in the present case, but rather its preemption of a question of fact to be decided by the jury and its failure to have adequate foundation in the evidence.

In *United States* v *Hall*, 552 F2d 273 (9th Cir, 1977), wherein it was held that the trial court did not err by refusing to give the defendant's requested instruction, the Court stated:

> Where the evidence raises a factual issue, an instruction *dictating* the result invades the ultimate role of the jury. (Emphasis added). *Id.* at 275.
>
> See also, *United States* v *Pritchard*, 458 F.2d 1036, 1040 (7th Cir, 1972).

In the present case, the proposed instruction had foundation in the trial evidence, and in no ways invaded the fact-finding province of the jury. The trial court was therefore obligated to give the defendant's requested instruction or otherwise adequately state the defendant's theory to the jury. *United States* v *Garner, supra.*

Further, if the trial court declined to give the requested instruction on the basis that it was argumentative, the court was still obliged to be specific as to what portions were unsuitable where, as here, the defense was willing to consider deletion. The trial court's failure to give any theory of defense instruction cannot be excused by defense counsel's nonsubmission of a revised requested instruction. The trial court refused to offer counsel any guidelines with respect to what it would deem an acceptable instruction.

The theory of the defense is essential to fair and balance jury instructions. The defendant's requested instruction was accurate, had a basis in law, and fairly represented the issues of the case to the jury. In the absence of otherwise adequately presenting to the jury the defendant's theory of defense, the trial court was required to give the requested

instruction, and its failure to do so constituted reversible error. The Court of Appeals erred in holding that the trial court's general instructions sufficiently covered the substance of the requested theory and presented the defense theory to the jury.

II. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON COUNT III, WHERE THERE WAS NO EVIDENCE TO SUPPORT A FINDING OF GUILT, AND DEFENDANT'S CONVICTION FOR THE SAME, NECESSITATES REVERSAL OF THE DEFENDANT'S CONVICTION ON BOTH CHARGES AND REMAND FOR NEW TRIAL ON COUNT I.

Count III of the indictment charged Petitioner with aiding and abetting the possession with intent to distribute phencyclidine (PCP). The PCP at issue was contained in a peanut jar and found in the refrigerator at Catherine Anthos' trailer on February 23, 1978 by Federal agents.

At the close of the prosecutor's case-in-chief, defense counsel made a motion for directed verdict of acquittal with respect to Count III on the basis that there was no evidence linking the defendant to the contraband (T IV 90; App II 9a). Defense counsel pointed out that admitted conspirator Pesci testified that neither he nor the defendant knew about the PCP in the refrigerator (T IV 90-91, App II 9a). Defense counsel also pointed out that the jar was not in open view (T IV 97; App II 14a). In response, the prosecutor claimed that there was circumstantial evidence to infer that defendant had dominion and control over the jar in the refrigerator (T IV 93-95; App II 11a-12a). Defense counsel replied that there were no circumstances established by the evidence but only possible speculations, and to submit the charge to the jury on such basis would allow the jury to engage in mere conjecture. (T IV 97-98; App II 13a-14a). The trial court denied defense counsel's motion (T IV 98-100; App II 14a-15a).

The trial court erred in denying the motion for directed verdict of acquittal on Count III. In 2 Wright's Federal Practice and Procedure (1969), Criminal Law, §463, p. 245, it is stated:

> The Motion for Judgment of Acquittal at the close of the government's case implements 'The requirement that the prosecution must establish a prima facie case by its own evidence before defendant may be put to his defense. (Footnote omitted)

In *United States* v *Conti*, 339 F 2d 10 (6th Cir, 1964), the Court of Appeals stated that in deciding a Motion for Directed Verdict, the evidence must be taken in the light most favorable to the prosecution and the evidence must be substantial:

> In making such a determination the Court must take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the Government, without weighing the evidence or determining the credibility of the witnesses. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion *Battjes* v *United States*, 172 F 2d 1, 5, C.A. 6th; *Kowalchuk* v *United States*, 176 F 2d 873, 876, C.A. 6th; *Apel* v *United States*, 247 F 2d 277, 279, 280, C.A. 6th; *N.B.R.B.* v *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660. *Id.* at 13.

The *United States* v *Collon*, 426 F 2d 939 (6th Cir, 1970), the Court further stated that if the evidence permits some doubt in a reasonable mind, the Motion for Directed Verdict must be granted:

> However, if under such view of the evidence it is concluded there must be some doubt in a reasonable mind, the Motion for Acquittal must be sustained. *United States* v. *Gaines*, 353 F 2d 276 (6th Cir, 1965); *United States* v. *Conti*, 339 F 2d 10 (6th Cir, 1964); *Curley* v. *United States*, 81 US App DC 389, 166, F 2d 229 (1947), Cert Den, 331 US 837, 67 S.Ct. 1151, 91 L. Ed. 1850. *Id.* at 942.

In this case, it must be kept in mind that defendant was not charged with the in-process PCP in the bathroom, bedroom, or paper bag, but rather with the PCP in the jar in the refrigerator. There was *no* evidence that defendant handled or touched the jar. There was *no* evidence that defendant went into the refrigerator or even into the kitchen. There was *no* evidence that defendant knew about it or was told about it. In fact, there was evidence to the contrary. Star prosecution witness Pesci testified that the defendant did not know about the jar because he [Pesci] did not even know about it. (T III 88-89; App II 16a-17a). Moreover, there was no evidence that the defendant had private access to the mobile home or was a frequent visitor to the mobile home. To the contrary, the mobile home was owned by Pesci and Catherine Anthos, and was occupied exclusively by Catherine Anthos (T III 89; App II 17a). In fact, the testimonies of admitted co-conspirators and long-time PCP drug dealers Pesci and Murdzia, showed that the defendant had never had any prior drug contacts with either of them (T II 97, T IV 11-12; App II 17a-18a, 18a-19a).

The theory of the prosecution with respect to the Count III was that defendant aided and abetted the possession with intent to distribute the PCP found in the refrigerator. In order to sustain its burden of proof, and to obtain a valid conviction pursuant to 18 USC 2 and 21 USC 841 (a) (1), the prosecution was required to show by substantial evidence that the defendant willingly associated himself with the criminal venture, willfully participated in it, and sought by his actions to make it succeed. *Nye* v *Nissen*, 336 US 613, 619; 69 S CT 766; 93 L ED 919 (1949). See also *United States* v *Martinez*, 555 F2d 1269 (5th Cir, 1977). The prosecution's proofs in this case showed only that defendant was present at the mobile home and with Pesci. Its proofs failed to

establish so much as knowledge of the criminal venture with regard to the PCP in the refrigerator, let alone willful association and participation. As noted above, the PCP was not even in open view within the trailer. See *United States* v *Flores*, 564 F 2d 717 (5th Cir, 1977).

Even if the prosecution's proofs had established knowledge, such knowledge would have been insufficient to sustain a conviction:

> 'But knowledge that a crime is being committed even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting.' *United States* v *Bryant*, 461 F 2d 912, 920 (6th Cir, 1972) (Citations omitted).

In *United States* v *Longoria*, 569 F 2d 422 (5th Cir, 1978), the defendant was charged with aiding and abetting possession of marijuana with intent to distribute. The Court of Appeals reversed the conviction, holding that the evidence, and all reasonable inferences favorable to the prosecution, was not such that the jury could reasonably and logically infer that the defendant was guilty beyond a reasonable doubt of aiding and abetting the offense charged. There, the Court stated:

> Proof that a defendant was merely associated with a criminal, or that defendant was present at the scene of a crime is not, without more, sufficient to sustain a conviction for aiding and abetting a criminal venture.
>
> To be upheld, the conviction must be based on evidence that the "defendant was associated with the criminal venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed." To prove association, there must be evidence to establish that the defendant "shared in the criminal intent of the principal." To prove participation, there must be evidence to establish that the defendant engaged in some affirmative conduct; that is, there must

> be evidence that defendant committed an overt act designed to aid in the success of the venture. Proof of mere negative acquiescence will not suffice. (Citations omitted) *Id.* at 425.

Noting, without deciding the issue, that a charge for mere possession would have been more easily sustained by the prosecution, the Court emphasized that the defendant had been charged with an offense involving intent to distribute. The Court found insufficient evidence to show that the defendant shared the principal's intent to distribute the marijuana and to establish affirmative conduct on the defendant's part designed to aid the distribution. *Id.*

In the instant case, no evidence was adduced at trial to link the defendant to even possession of PCP in the refrigerator, much less to a plan to distribute it. The *only* connection between the illicit drug and the defendant was that they were both present in the same place—Anthos' trailer. It is indisputable that the defendant's mere pressence at the place where drugs are found is insufficient to sustain a conviction. *United States* v *Moore*, 546 F 2d 657 (5th Cir, (1977); *United States* v *Rojas*, 537 F 2d 216 (5th Cir, 1976), cert. denied 492 US 1061, 97 S Ct 758, 50 L Ed 2d 777 (1977); *United States* v *Epperson*, 485 F 2d 514 (9th Cir, 1973). Absolutely no evidence was offered by the prosecution to show that the defendant had dominion and control over the drug.

In *Murray* v *United States*, 403 F 2d 694 (9th Cir, 1968), wherein the defendant's conviction was reversed for insufficient evidence, the Court stated:

> ' . . . mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession,' *Arellances* v. *United States, supra*, 302 F. 2d at 606; *Evans* v. *United States*

(9th cir, 1958 257 F. 2d 121, 126, cert. denied 358 U.S. 886, 79 S.Ct. 98, 3 L.Ed. 2d 99 (1958). *Id.* at 696.

Both at trial and before the Court of Appeals, the prosecution, unable to cite any evidence showing the defendant's participation or knowledge, argued that an inference could be drawn that defendant exercised dominion and control over the PCP in the jar in the refrigerator because he knew Pesci was making PCP or was involved with Pesci in making PCP. This however cannot be done because the evidence showed that the PCP in the refrigerator was different from the in-process PCP in the bathroom, bedroom, and paper bag, and because the evidence did not show that defendant was involved in any other PCP dealings with Pesci, Murdzia, or Catherin Anthos. The first point was established by Chemist Fuelster's testimony. Chemist Fuelster testified that the substance found in the mobile home and in the paper bag consisted of Cyclohexanone, Piperidine, and an unknown substance (T IV 33-37, 48-49; App II 19a-24a), whereas the substance found in the refrigerator was PCP, Hydrochloride, and reaction by-products (T IV 50-51; App II 24a-26a). This testimony clearly indicated that the PCP in the refrigerator was much older or from another source. The second point was established by Pesci and Murdzia, both of whom indicated that defendant was not involved in any of their other dealings and did not get involved in this matter, even by his mere presence, until late.

The trial court's denial of defendant's Motion for Directed Verdict, and submission of the charge to the jury, impermissibly allowed the jury to return a guilty finding on the basis of nothing more than mere speculation and conjecture. While the prosecution's proofs with respect to the conspiracy charged in Count I of the indictment may have raised suspicions as to defendant's involvement with the PCP in the refrigerator, such suspicions do not constitute evidence sufficient to sustain a guilty verdict.

As noted by the Court in *Murray, supra.*

That evidence, of course, may give rise to a suspicion that Lonnie was implicated with Johnnie in the importation and concealment of the heroin, *but a suspicion, however strong, is not proof.* (Emphasis added). *Id.* at 696.

See also *United States* v. *Bethea,* 442 F 2d 790, 792-793 (D.C. Cir, 1971).

In affirming the defendant's conviction for Count III, the Court of Appeals made no mention of any evidence to support that conviction. Indeed the Court of Appeals opinion fails to indicate whether it dismissed the defendant's claim of error on the basis of finding sufficient evidence or because it adopted the prosecution's argument that it need not decide the issue pursuant to the concurrent sentence doctrine.

Moreover, in the absence of any evidence from which the jury could find the defendant guilty of Count III beyond a reasonable doubt, the conviction in this case is invalid as a denial of due process. In *Jackson* v *Virginia,* US ; 99 S Ct 2781; 61 L Ed 2d 560 (1979), a case involving a conviction in state proceedings, this Court recently stated:

> The constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "*proof* beyond a reasonable doubt. . . ." In subseuquent cases discussing the reasonable doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves. In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offene.
>
> * * *

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substative constitutional standard must also require that the factfinder

will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. (Citations and footnote omitted) *Id.* at 61 L Ed 2d 571, 572-573.

Defendant's protection against a federal conviction unsupported by proof beyond a reasonable doubt is no less under the Fifth Amendment due process guarantee.

Thus, in the absence of any evidence sufficient to support the jury's finding of guilt, and any additional proofs to be offered by the prosecution, Petitioner respectfully submits that this Court should not hesitate to find that the Court of Appeals erred in affirming the conviction, to reverse the decision below, and to order the case remanded and Count III dismissed.

Further, Petitioner maintains that the trial judge's refusal to dismiss Count III for Possession prejudiced him and tainted his conviction on Count I for Conspiracy. It cannot be denied that jury consideration of an unsupported charge necessarily prejudices the accused to some degree, In this case, the evidence introduced in connection with the unsupported charge was particularly prejudicial because it clearly showed that the PCP in the refrigerator was much older or from a different source. Thus, the jury was improperly allowed to consider and did conclude that defendant was previously involved with PCP. Such conclusion could not fail to affect the determination of whether or not defendant was involved in the ongoing conspiracy alleged in Count I, charged to have begun on December 21, 1977. The danger that the evidence introduced in connection with Count III adversely affected the jury's determination with respect to the conspiracy charge cannot

be ignored or held harmless where, as here, the prosecution's case was based entirely upon mere presence and the testimony of admitted conspirators. *Cf., United States* v *Van Buren,* 568 F 2d 607 (8th Cir, 1978), cert. denied 435 US 932, 98 S Ct 1506, 55 L Ed 2d 529 (1978). Therefore, Petitioner also maintains that he is entitled to reversal of the conspiracy conviction and remand for a new trial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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DATED: February 25, 1980.

APPENDIX I

TABLE OF CONTENTS TO APPENDIX I

Page

Decision Below of Sixth Circuit Court of Appeals affirming District Court Judgment 1a-2a

Decision Below of Sixth Circuit Court of Appeals denying Petition For Rehearing 2a-3a

79-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FRANK MUNOZ, JR.,
Defendant-Appellant

ORDER

(Filed: December 6, 1979)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

Appellant Frank Munoz, Jr. was found guilty following a district court jury trial of conspiracy to manufacture and distribute phencyclidine (count 1), and possession with intent to distribute phencyclidine (count 3), in violation of 21 U.S.C. §§841(a)(1) and 846. In his direct appeal Munoz asserts that the evidence was insufficient to support a conviction of possession under count 1 and that the trial court erred in refusing to instruct the jury upon the defendant's theory of defense. Munoz further claims that the trial court erred in allowing the prosecution to show that a prosecution witness faced possible retribution for his testimony, and that the trial judge abused her discretion when she allowed the government to introduce upon rebuttal certain testimony concerning the scene of the crime and then refused defense counsel's motion for a jury view of the same scene.

Upon a review of the entire record, the court is satisfied that the several claims on appeal are without merit and that no error intervened in the proceedings to deny the defendant a fair and imparital jury trial.

The court finds the most serious allegation to be that the trial judge committed error in failing to grant defense counsel's request for a separate instruction concerning the theory of the defense. The court is of the opinion that while it would have been the better practice for the trial court to have given a short and concise statement of the defendant's claim of defense to the jury as a separate instruction, failure to do so under the circumstances present here did not constitute reversible error. The instructions which defense counsel tendered to the court tended to be argumentative, and the substance of those instructions was, in all events, covered by the court's charge to the jury. The court instructed the jury that mere presence at the scene and knowledge of the commission of a crime are not sufficient to establish that the defendant aided and abetted in its commission. This instruction, coupled with the charge concerning the credibility of the witnesses adequately presented the defense theory to the jury. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

ORDER

(Filed: January 22, 1980)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

In an order filed December 6, 1979, this court affirmed the judgment of the district court entered upon a jury verdict finding the defendant Frank Munoz, Jr. guilty of conspiracy to manufacture and distribute phencyclidine (count 1) and possession with intent to distribute phencyclidine (count 3), in violation of 21 U.S.C. §§841(a)(1) and 846. In his petition for rehearing, appellant has brought to the court's attention a clerical error in its December 6 order. Line seven of that

order refers to the charge of possession of phencyclidine as "count 1" when this charge in fact constituted count 3 of the indictment, as specifically recognized by the court in line four of its order. Although the court appreciates counsel's attention to this matter, we note that the error was purely clerical in nature and in no way affected the substance or outcome of the appeal.

The arguments advanced by the appellant in his petition for rehearing raise no issues which were not fully considered by the court in the defendant's direct appeal. Accordingly,

IT IS ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

APPENDIX II

TABLE OF CONTENTS TO APPENDIX II

	Page
Request for Theory of Defense Instruction and Trial Court Ruling	4a-6a
Jury Charge Excerpts	6a-8a
Motion for Directed Verdict and Court Ruling	9a-15a
Excerpts from Testimony of Robert John Pesci	16a-18a
Excerpts from Testimony of Kurt Michael Murdzia	18a-19a
Excerpts from Testimony of Chemist Roger Fuelster	19a-26a

Request for Theory

(17)

It's the Government's feeling if Mr. Halpern has any objections it's his duty to come up with them now and specifically state them in order to aid the Court in its present decision. These instructions are going to be given today.

THE COURT: Or I would think at the very latest after the instructions have been given.

If there is some difficulty at that time, some deviation or some new matter that you would want to bring to my attention, that would be my last opportunity to correct the instructions. And that's really what I took it Mr. Halpern was saying. Maybe not. I thought he was saying—

MR. HALPERN: (Interposing) Yes. That's exactly what I thought.

THE COURT: (Continuing)—"I might have some after you're finished with your instructions."

MR. HALPERN: Yes. In fact, in that regard, rather than belabor it any further, I'm not going to indicate anything further at this time and save it for another, hopefully appropriate, time after the Court's charge.

The Court will recall, however, that (18) I submitted a written theory of the defense and I would submit it for reading it at this time. The Court expressed some reservations; indicated, in fact, that it would not give that theory of defense.

THE COURT: I did say I would give a short, succinct, non-argumentative theory for both parties if you wished me to and could agree. I obviously can't give one person's theory and not the other's.

MR. HALPERN: About the short part, my request covers three pages. There couldn't possibly be, the way I normally write, more than four words on a line and every other line is skipped. Maybe five words on a line, sometimes. And it's not a long charge. I consider it to be a short charge.

THE COURT: Well, I wasn't—I didn't say that I thought that it was all that lengthy. What I said was that I would not

Request for Theory

give it—I would give a short, succinct, non-argumentative theory of the case. In my review it contains many evidentiary references that I really don't think is proper for the Court to underscore on behalf of either party in terms of their theory of the case. I think that each party's theory of the case can be essentialized in terms of the major conceptual thrust of the Government's theory, and I think that your position can be conceptualized in much the same way.

(19)

MR. HALPERN: Your Honor, I'd like to, in any event, submit that for the record, and that is my best thrust of theory of the defense. And under the circumstances that the Court declines to give it or even if the Court will be specific as to what portion of it the Court would delete, I would be—at least I would like to consider that. But simply to say that the Court won't give it I don't know is relevant.

THE COURT: Well, then, I will say what I think is wrong with it.

It's argumentative, and I don't think the Court should be in the position of submitting to the Jury, even with the caveat to the Jury this is the theories of the party or the theory of the party, what amounts to something that sounds like commentary on the evidence. For either party.

So with regard to your saying I could tell you what portion of it I would give, I think I did tell you yesterday that I would give a short, succinct, non-argumentative statement of the theory of the parties. And I put the burden on you, therefore, yesterday to resubmit to me something today.

MR. HALPERN: Yes, your Honor, you did. And I'd like to submit the theory.

THE COURT: Fine.

(20)

Is this—this is yesterday's that I looked over.

MR. HALPERN: Yes, it is.

THE COURT: Other matters, Mr. Halpern?

Request for Theory

MR. HALPERN: I'm sorry, your Honor.

THE COURT: Other matters?

MR. HALPERN: One.

The Court will recall I suggested in the meeting about the charges that the Court give a charge to the Jury in some manner concerning Grand Jury.

The Grand Jury returned an indictment.

I rested and half kiddingly suggested something when the Court asked what I proposed, but I don't know whether that, I have a charge concerning a Grand Jury indictment, other than indicating that an indictment doesn't mean anything, that indictment doesn't mean anything with respect to the question to be determined by the Jury. I don't have a suggestion and I don't know that Blackmar has one, but if they do I would like the Court to consider it, giving that charge.

MR. DAMREN: Your Honor, I believe there's an instruction in there regarding indictment.

Jury Charge Excerpts

(118)

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires be done.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires be done.

You of course may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the Defendant participated in its commission.

In this connection, mere presence at the scene of the crime and knowledge that a crime is being committed are not

sufficient to establish that the Defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

(124)

The Jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duties of calling any witnesses or producing any evidence.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

There are two types of evidence. One is direct evidence—such as the testimony of an eyewitness. The other is called circumstantial evidence—the proof of a chain of circumstances pointing to the commission of an offense.

As a general rule, the law makes no distinction between direct and circumstancial evidence, but simply requires that, before convicting a defendant, the Jury be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

As stated before, you, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which (125) tends to show whether a witness is worthy of belief. By the word "witness" here, of course, I refer also to the Defendant, Mr. Munoz, who did take the stand and become a witness in his behalf, as he had a right to do, and I will be advising you with respect to that shortly.

Consider each witnesses' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as

having an accurate recollection of these matters. Consider also any relationship each witness might bear to either side of the case; the manner in which witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in this case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of the discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional (126) falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

There was testimony in this case from a witness who was qualified as an expert.

The Rules of Evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witness". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider the expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of the expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

(90)

MR. DAMREN: With that, your Honor, the Government would rest.

THE COURT: Mr. Halpern?

MR. HALPERN: I'd like to address the Court outside of the presence of the Jury.

THE COURT: We will ask the Jurors to step into the Jury room.

(The Jurors left the courtroom)

THE COURT: Mr. Halpern?

MR. HALPERN: Primarily for the record, your Honor, I want to move for a directed verdict.

I think there is some evidence here that links my client, but even technically—the reason I want to make the motion, more than simply for the record, is that the charge here is a conspiracy charge. That's one of the charges.

The other is a charge—that's in Count 3—for possession of Phencyclidine.

There's been absolutely no evidence whatsover that would link Mr. Munoz with Count 3, and that's what I'd like to emphasize in presenting an argument for a directed verdict.

The testimony of Mr. Pesci indicated, without contest, that Mr. Munoz knew nothing about that item—(91) I forget the exhibit number—that item that was found in the refrigerator.

To allow that Count to go to the Jury would simply allow them to do nothing but speculate, since there isn't one iota of evidence connecting Mr. Munoz with—the situation on the conspiracy is more arguable, I think, in that there might be some argument, certainly, to be presented by the Prosecution as to why a directed verdict shouldn't be granted by the Court, but that the matter should be decided by the trier of fact, although I'd like to present an argument in that regard as well.

There has been nothing presented by the Prosecutor through any witness other than through Mr. Pesci that Mr. Munoz had anything whatsoever to do with the conspiracy

that's being charged. Other than his presence, there is nothing to tie him in other than Mr. Pesci's testimony.

Mr. Murdzia in no way ties in with Mr. Munoz. In fact, the substance of Mr. Murdzia's testimony is such that the only testimony with respect to Mr. Munoz extracts or extricates, if that's the right word, him, that is, Mr. Munoz, from the involvement, the testimony being that he said he didn't want any part of it; that if you could get that kind of stuff, then it must be a DEA or it must be the police.

So what it comes down to is possibly the observation of Agent Powell that he saw Mr. Munoz go into (92) the trailer; that there was a strong odor, there, that was a chemical odor; that he saw Mr. Munoz in some way with a package, but we don't know if that's the same package, and there is no evidence that was the same package. We may be speculating, but it isn't.

I emphasize that the only evidence tying Mr. Munoz to the alleged conspiracy is the evidence that was given by Mr. Pesci; that is, that Mr. Munoz allegedly brought these chemicals to his home, and I believe that the tenor of the testimony of Mr. Pesci is such that the Court should not allow it to arise to the level of allowing that kind of testimony to be a basis for a conviction.

The promises that have been made to him, the pressure that he was under, were all so strong and so great that that part of his story against Mr. Munoz, being the only part that ties him in, shouldn't be allowed to be a basis for a conviction.

Again, your Honor, I feel that there is some weakness in my argument with respect to the conspiracy aspect, but I think there is no question but that there is absolutely no evidence to tie him to Count 3.

Thank you.

THE COURT: Thank you, Mr. Halpern.

Let me just indicate, first, with respect to the conspiracy argument, that the Court could not (93) say as a matter of law, as I think Mr. Halpern recognizes, that Mr. Pesci's

testimony could not be believed; that is to say, that no reasonable person could believe that testimony; and therefore, viewing the evidence in a light most favorable to the Government, the motion will be dismissed with respect to Count 1.

Mr. Damren, would you reply, please, to Mr. Halpern's argument with respect to Count 3?

MR. DAMREN: Your Honor, I think much of Mr. Halpern's argument—and in a way I'm sure he feels like he's caught on both sides of the buzz saw—on one hand he wants to indicate that Mr. Pesci's testimony is not to be believed to too great an extent; however, on the other hand, as to Count 3, he wants to have us believe that. And I would point out to the Court that the basis of Mr. Pesci's statement which Mr. Halpern places so great a reliance on that Frank didn't know anything about it is completely uncut by the fact that Mr. Pesci said, "I didn't know the jar was there, I didn't know anything was in there".

From that he reached the conclusion that Frank didn't.

Now, quite frankly, Mr. Pesci can't look inside the mind of another person and know what their knowledge is; and, quite frankly, given all the facts and circumstances of this case leading up to it, the long term (94) involvement of Mr. Munoz and Mr. Pesci and another individual named Dennis Reid in terms of their intent to get the Phencyclidine, the fact that Mr. Pesci's testimony indicates that it was Mr. Munoz who brought the other chemicals, the precursors or the stages previous to the phenylmagnesium bromide, the circumstances of his access to the trailer, his actions inside the trailer, I think clearly indicate that Mr. Munoz' position in this conspiracy, and, vis-a-vis, his intent and his dominion and control over other items clearly extends to, circumstantially, to the evidence that was found in the refrigerator.

Mr. Munoz clearly was involved in this for a long period of time, clearly knew where the phenylmagnesium bromide was. It was he who suggested the meeting at Catherine's

place. The entire location there, as the photographs indicate, was set up as a laboratory. And I think also that the thing to point out is the common place, apparently, in this place of keeping the Phencyclidine happened to be in the refrigerator. It was in Mr. McCorquadale's refrigerator and ends up in Miss Anthos' refrigerator, or, more properly, put in the refrigerator in Miss Anthos' trailer.

I would submit to the Court that the basis of Mr. Munoz' possession of that Phencyclidine would be based on circumstances—and I don't think that the fact that there is some apparent contradiction, although I think it's (95) quite clear that it's baseless, an apparent contradiction of the Government case-in-chief forestalls or stops the Court from, in any way, viewing the other circumstances.

I think it's no different than in a state case, for instance, where witnesses are called to the scene and they see an assault or something and some of them differ as to what happened. Some of them indicate self-defense or some of them indicate nothing happened, and some of them indicate something happened. The fact that there is a contradiction in the case, in the Government case-in-chief, does not in any way empower the Court to make that kind of ruling.

I think the facts and circumstances leading up to these events—and plenty of the events that Mr. Pesci testified to himself about Mr. Munoz' involvement in this Phencyclidine thing indicate that Mr. Munoz was involved on a higher level than Mr. Pesci—and I think that circumstance and that inference is not in any way unjustified and I think it flows from the evidence.

For that reason I think there is more than adequate circumstances to justify the sending of that Count to the Jury.

THE COURT: Does it make any difference to your argument, Mr. Damren, or your position, that this item is in the refrigerator? I mean, that is to say, that it's not (96) in open view?

MR. DAMREN: I think it would with respect if the only involvement we had with Mr. Munoz came from the

circumstances as told by the agents or from Mr. Murdzia. I don't think it was—well, I'm, I—strike that.

As to Mr. Murdzia, I don't think it does when you look at the testimony of Murdzia as directly putting Mr. Munoz involved in this crime, in the activities of trying to procure Phencyclidine in terms of manufacturing it, of the proposition, apparently, put to Mr. Pesci by, and Mr. Munoz, by Mr. Reid at some time in the past, and the fact of Mr. Munoz' relationship to Mr. Reid, which Mr. Pesci did detail.

I think adding those things to the mere facts and circumstances, I think, completely justifies the continuation of that Count in going to the Jury.

THE COURT: Well, I guess that one could say that there is circumstantial evidence of Mr. Munoz' intent to possess Phencyclidine.

MR. HALPERN: Your Honor, interrupting, I'd like to see where the Court is going, of course, and I won't interrupt if the Court is on my side, but I'd like to respond to what the Prosecutor has been saying.

THE COURT: Please do so. I simply (97) wasn't aware that you were rising. Go ahead.

MR. HALPERN: Thank you.

The Prosecutor talks in terms of circumstantial evidence. But the circumstances that he describes are all speculations.

Mr. Murdzia never said anything—one could imply, one could infer, that he, Mr. Murdzia, said something about Reid, and so too did Mr. Pesci say something about Reid, and Pesci said something, in fact saying that Mr. Munoz knew Mr. Reid, and that therefore there was what the Prosecutor calls some relationship.

Mr. Murdzia—and I'd love to have that testimony, I think, read back to, if no one else other than the Prosecutor—Mr. Murdzia said nothing with regard to any involvement by my client. What the Prosecutor is saying is that these speculations should be made into a compilation of inferences to allow the Jury to reach that conclusion. And

I'm suggesting that that's the reason for the, for the Court exercising it's power to direct a verdict; that it's not a matter of circumstantial evidence. It's a matter of allowing the Jury to speculate on inferences.

Nothing is in open view. As the Court pointed out, one would have to assume all kinds of things to get to the point of, even reach the point of circumstantial evidence.

(98)

Thank you.

THE COURT: Well, what would be your position, Mr. Halpern, had it been in open view, to turn around the question that I asked Mr. Damren?

MR. HALPERN: Well, I think that would be a circumstance. I agree that that would be a circumstance, and maybe based on that circumstance the Court might have a basis for not directing a verdict here, although obviously I would argue otherwise that the mere fact that open view wouldn't be enough.

I think it's a circumstance, but here we have no circumstances. There is an inference being made, amazingly, by the Prosecutor that Mr. Munoz can be thought to be the head of the entire Midwest operation of PCP dealing, and on that basis the Jury may infer that he's such a bigshot that we can't get good information on him and good circumstances, even. So let's infer that he's that kind of an operator and figure that we don't have real evidence here because he's so smart.

I'm suggesting to the Court that there is no evidence to go to this Jury on a circumstantial basis at all to allow them to do anything but speculate as to whether or not Mr. Munoz was in possession of what was found in the regrigerator.

THE COURT: I'm not certain that it was (99) Mr. Murdzia's testimony, but did not someone testify about Mr. Munoz' presence during a conversation between Pesci and Murdzia relative to—

MR. HALPERN: (Interposing) Yes, your Honor. That was done by Mr. Murdzia. That was his testimony.

And in the course of that testimony he indicated that the position expressed by Mr. Munoz was that he didn't want anything to do with it. That was the conversation.

Now, you want to infer from that what? That he didn't want something to do with it and that he did have something to do with it?

THE COURT: Well, I think it's possible to take one of the two inferences from that testimony, and that's exactly what makes, analytically, something a jury question, that it's possible to take one of two inferences, because Mr. Murdzia, as I recall, also went on the say that, as you have refreshed my memory, that Mr. Munoz did not want to do it because he thought that it might be a DEA inspired plan, which also could suggest the inference that Mr. Munoz had, in fact, intention to do it but this simply wasn't his idea of a wise thing to do.

All I'm saying is that there are two possible inferences to be drawn from that.

MR. HALPERN: No. I disagree with (100) the Court.

One is it could be an inference to be made that he didn't want anything to do with it. The other is pure speculation that he didn't want anything to do with it, but maybe he really did.

THE COURT: All right, Mr. Halpern. I think that that's a matter more properly directed to the Jury.

In terms of what you believe is permissible for them to find, I would say that viewing the evidence in the light most favorable to the Government there is sufficient circumstantial evidence of Mr. Munoz' intention, that is, of his domination and control, to take this issue to the Jury. I think that clearly, in my view, there is not the same weight of evidence that there is with respect to Count 1. But at this point, I will permit Count 3 to go to the Jury.

MR. HALPERN: One other thing I'd like to ask the Court.

(88)

A. As far as what? I don't understand.

Q. Well, was there any particularities, like insurance that had to be paid?

A. Oh, sure.

Q. And the authority, then, was under Frank Munoz's company.

A. It was. The legal way to do the hauling was it had to be Frank, Franco Freight (sic), Frank Munoz as the owner, and my son filed an assumed name as Franco Freight, John Pesci, and Frank leased the authority to me and my son and we carried all the insurances and paid for the plates and stuff.

Q. Were there occasions at all after that was accomplished that you and Frank needed to meet about it?

A. Sure.

Q. Do you have a recollection at this point, exactly or even approximately how long ago it was that you offered a plea of guilty to the Court?

A. I think it was Friday. Last Friday? Or Thursday.

Q. When you offered that plea to the Court, you made some statements, I assume, indicating your guilt.

A. Yes, I did.

Q. Before going into any other aspect, let me ask you something specifically.

There was—was there any PCP found, to your knowledge, or in, to your knowledge, the (89) refrigerator in the trailer?

A. Well, I understand that there was supposed to have been an ounce in a peanut butter jar, or something.

Q. Did you know that before you were told about it?

A. No, I didn't.

Q. You didn't know about the PCP?

A. In the peanut butter jar?

Q. In the refrigerator.

A. No.

Q. The trailer was occupied in terms of residency by whom? Do you know?

Excerpts from Testimony of Robert John Pesci

A. Catherine Anthos.

Q. And how do you describe your relationship with Catherine Anthos?

A. She was my girlfriend.

Q. And what, if anything, did you have to do with her residing there, even having the trailer?

A. We, her and I put some money together and we bought it.

Q. Around February of this year, January, February, around that time, how often would you and Catherine Anthos meet and see each other?

A. Two, three times a week.

Q. And on those occasions when you saw each other did you see Catherine Anthos at the trailer as well?

A. Yes.

(97)

A. I explained the whole thing to him.

Q. You had indicated that there was a time even before this situation at hand that you delivered some PCP, I believe, to Kurt Murdzia.

A. Yes, I did.

Q. And you indicated further that Frank had nothing to do with that at all.

A. No, he didn't.

Q. In fact, you indicated that in some conversation that you had with Frank some time, months before that, in reference to the idea of making this PCP, that Frank nixed it or didn't want anything to do with it at that time.

A. Yes, I did.

Q. You testified, too, in response to the Prosecutor's questions that you know that Frank knew Dennis or Denny Reid. Correct?

A. Yes.

Q. Was Dennis Reid a person whom you worked with in terms of dealing PCP?

A. No.

Excerpts from Testimony of Robert John Pesci

Q. Was Dennis Reid, at that point in time—in any event, would you consider him to be a friend?

A. I thought he was.

Excerpts from Testimony of Kurt Michael Murdzia

(11)

A. I can't even begin to tell you because different occasions I brought the money. I don't know if you want to count that in it or just us talking, or—

Q. (Interposing) Just the occasions that you received PCP from Mr. Pesci.

A. Without the other occasions counted, I would estimate between eight and ten times, maybe.

Q. And have you ever attempted to figure out, or do you know, either one, the total amount of money that you turned over to Mr. Pesci over that period of time for that three or four pounds?

A. No.

Q. You indicated there was four hundred and fifty or five hundred dollars per ounce, approximately?

A. Yes.

Q. Three and a half pounds would figure, would it not, to about 55 ounces, 16 ounces in a pound.

A. Yes.

Q. I have the advantage of having a pen and pencil.

Would you be able to figure out per ounce, then, what 50, 55 ounces would come to?

A. No, I wouldn't.

And on a different scale, if you would, if I would sell three ounces at one time it would be a (12) smaller price.

Q. The greater the quantity the better price you were able to get it for and—

A. (Interposing) Yes.

Q. Make more money.

A. Less.

Q. You'd make less money?

A. I would make what profit I would.

Excerpts from Testimony of Kurt Michael Murdzia

Q. You'd make less money per ounce, is what I'm saying, is what you're saying.

A. Yes.

Q. On every one of those occasions that we are talking about so far, these ten occasions that you dealt with him in the past, on any of those occasions had you ever had any dealings with Frank Munoz?

A. No, I haven't.

Excerpts from Testimony of Roger Fuelster

(33)

Additionally on the counter there was a stainless steel pail that had white residue in the bedroom area.

Other than the equipment that was there, I mean bowls and spatulas, there was a cereal dish that contained white powder.

Samples were taken of all those powders and subsequently analyzed.

Q. I'm going to show you Government's Proposed Exhibit 3 and ask you to take a look inside that box and see if you can identify the contents.

A. Yes, sir, I can.

Q. What is it, please?

A. That's the galvanized bucket and the remainder of the powder that was present in it at the time of the search.

Q. Okay. And did you have occasion to analyze that powder?

A. Yes, sir, I did.

Q. Would you tell us what tests you performed on it?

A. On this particular case I employed gas chromatography. This test, a solution is made of the material and it's injected into an instrument whereby the material goes through a heated column and it's separated into its components, and these are detected then.

Q. Did you perform any other tests on them?

A. Not specifically related to its identity.

Excerpts from Testimony of Roger Fuelster

(34)

Q. After performing the first test what, if anything, did you reach as an opinion as to the nature of that substance?

A. I found the material to consist of cyclohexanone and piperidine and a quantity of an unidentified material.

Q. I show you Government's Proposed Exhibit 4 and ask you if you can identify that, please.

A. Yes, sir, I can. That is the stainless steel pail to which I referred.

Q. Is there any substance in it?

A. There is the remainder of the white powder that was present in the pail originally.

I have now sealed it in a plastic bag.

Q. Did you have occasion to analyze that powder?

A. Yes, sir, I did.

Q. What test did you perform on it?

A. I performed infrared spectrophotometry. It's a way of passing infrared light through a chemical molecule and measuring the wave lengths of light that are absorbed. This gives an analogous to a fingerprint sort of identification of a compound. Each one has its own particular pattern under graph.

Q. After performing that examination were you able to formulate an opinion as to what that substance contained?

A. Yes, sir.

Q. What was that, please?

A. I found the material to be an alkali cyanide. It's either (35) potassium or sodium cyanide, or possibly a mixture.

Q. I hand you Government's Proposed Exhibit 5 at this time.

Do you recognize that?

A. Yes, sir, I do.

Q.What is that, please?

A. Well, it's a quantity of moist yellow material now contained in the bag that I placed it in after analysis.

It was originally contained in—I'd have to check on that, which particular one. This has got a different number on it

than our numbering system.

Q. Did you make out a report in regard to these?

A. Yes, I did.

Q. And would referring to that refresh your recollection as to the contents and the nature of that package?

A. Yes, it would. Yes, sir.

Q. Does that refresh your recollection?

A. Yes, it does.

That was originally contained on the cookie sheet that was on the counter in the bathroom area.

Q. Did you analyze that substance?

A. Yes, I did.

Q. What test?

A. The same ones I performed on the material in the large galvanized pail, using gas chromatography.

Q. What was your conclusion?

(36)

A. I found it to be the same as the material in the galvanized pail, that is, cyclohexanone and piperidine, and a quantity of unidentified material.

Q. Let me show you Government's Proposed Exhibit 6 and ask you if you can identify that for us, please.

A. Yes, sir.

This is the strainer and the filter paper and the remainder of the material, now in my plastic bag. This was originally in the sink in the bathroom.

Q. Did you perform any tests on that to identify it?

A. Yes, sir, I did.

Q. What kinds?

A. The same as I have testified previously. Gas chromatography.

Q. And your opinion regarding that substance?

A. I found it to be the mixture of cyclohexanone piperidine, and the unknown material.

Q. Same as two of the other exhibits.

A. Yes, sir.

Q. Government's Proposed Exhibit 7.

Do you recognize that?

A. Yes, sir, I do.

Q. As what?

A. That is the bowl, and now sealed in my plastic bag the powder that was originally in that bowl, and this was sitting on the counter area in the bedroom.

(37)

Q. Did you perform tests on that to identify it?

A. Yes, sir, I did.

Q. And as a result of those tests did you formulate, then, an opinion as to its nature?

A. Yes, sir.

Q. What is that?

A. I found it to be a mixture, again, of cyclohexanone and piperidine, and additionally four compounds that are generated by the last step of the reaction that was apparently being taken place in the bathroom.

Q. I will show you Government's Proposed Exhibit 9 and ask you if you recognize that.

A. Yes, sir, I do.

Q. As what, please?

A. This is a vial containing a yellow liquid. This was sampled from the five gallon that was in the bathroom.

Q. And did you analyze that substance to determine its identity?

A. Yes, sir, I did.

Q. What was it, please?

A. I found it to be a solution of phenylmagnesium bromide and ether, which is solvent.

Q. Mr. Fuelster, on how many occasions, if you can recall, have you been called upon to examine what you described as clandestine labs?

(48)

Q. (By Mr. Damren, interposing) Could you compare the substance in the strainer, the bucket, and the cookie sheet in relationship to the substance in the saucer?

A. Yes, sir.

Q. What is that comparison?

A. The material in the saucer would be the end product of the reaction that was being started in the other containers.

Q. I'm going to show you Government's Proposed Exhibit 2, although it's been resealed once again.

Can you see the marker in there sufficiently to recall its identification?

A. Yes, sir.

Q. Okay. What is that, please?

A. Well, this is a powder that was submitted to the laboratory. I have no personal knowledge of its origin other than I received it in a sealed condition as part of this case.

Q. Did you analyze it?

A. Yes, sir, I did.

Q. Could you tell us the results of your analysis?

A. Well, again, I found it to contain cyclohexanone, piperidine, and an unknown compound and—four products that would indicate the final step of Phencyclidine synthesis had gone on.

Q. Does it compare with any of the exhibits in terms of composition, with any of the exhibits we have spread out here on the floor?

(49)

A. Yes, sir.

Q. And which exhibit would that be?

A. It's similar to Exhibit Number, the bowl with the powder in it. I can't read the number.

Q. This exhibit?

A. Yes, sir.

Q. It's Government's Proposed Exhibit 7.

Is there anything in this Government's exhibit besides the chemical compound?

A. Yes. It is an empty paper bag.

MR. HALPERN: I think the record should reflect what the Prosecutor has been doing.

I would leave it to him to describe it if he'd like to, but he's apparently laying out all these exhibits in a particular form before the Jury.

THE COURT: Yes. The record should reflect that the exhibits are placed in such a way as to accord with the witness' testimony or illustrate the witness' testimony.

Q. (By Mr. Damren) I show you Government's Proposed Exhibit 1 and ask you if you can identify that, please.

A. Yes, sir, I can.

Q. And what is that, please?

A. Well, this is a plastic bag containing the reserve after analysis, and also a glass bottle containing a portion of the (50) reserve after analysis.

Q. How did that come to your attention?

A. This was submitted to the laboratory for analysis.

Q. In what condition?

A. At the time I had received it the plastic evidence envelope was sealed and the two plastic bags, the plastic bag and the vial test I just described to you, ones I furnished during the course of the analysis, all of the material was originally contained in the empty plastic bag that is now inside.

I opened it by splicing off the bottom edge, which is now contained inside the package.

Q. Did you perform any tests on that?

A. Yes, sir, I did.

Q. What, please?

A. I performed mass spectroscopy to identify the compound present and also gas chromatography, in quantity, as to determine how much of the compound interest was contained in this mixture.

Q. Did you reach any conclusions as a result of those tests?

A. Yes, sir, I did.

Q. What?

A. I found the material to consist of approximately 16% of Phencyclidine, hydrochloride, and the rest of it was reaction by-products.

Excerpts from Testimony of Roger Fuelster

Q. I'm going to hand you Government's Proposed Exhibit 8, now, and ask you if you can identify that, please.

(51)

A. Yes, sir, I can.

Q. What is it?

A. It's a Peter Pan peanut butter jar and containers that I furnished that hold the reserve after analysis.

There are two empty plastic bags that originally held two quantities of powder.

Q. How did those come to your attention?

A. They were in the refrigerator of the mobile home that we have been talking about.

Q. And did you subject these substances in the peanut butter jar to analysis?

A. Yes, sir, I did.

Q. And what were your conclusions, if any?

A. I found both of the bags to contain powder consisting of Phencyclidine, hydrochloride, and other materials, reaction by-products.

Based on the physical appearance of the two powders, I actually did two separate quanitations. One of them was approximately 5% and the other one was approximately 3-½% Phencyclidine.

Q. Now with regard to the design of the laboratory in the trailer, would it be a particularly effective, or not, a particularly efficient means to produce Phencyclidine?

Supreme Court, U. S.
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No. 79-1346

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK MUNOZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1979. A petition for rehearing was denied on January 22, 1980. On February 21, 1980, Mr. Justice Stewart extended the time for filing a

petition for a writ of certiorari to and including March 6, 1980. The petition was filed on March 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the district court improperly refused to give petitioner's proposed "theory of the defense" instruction.

2. Whether the evidence was sufficient to support petitioner's conviction on the possession count of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to manufacture and distribute phencyclidine (PCP), in violation of 21 U.S.C. 846, and possession of phencyclidine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial showed that petitioner, together with co-defendants Robert J. Pesci and Kurt M. Murdzia, agreed to engage in the manufacture of PCP (III Tr. 67-82, 127). The plan was put into operation when another co-defendant, Dennis McCorquadale, obtained a can of phenylmagnesium bromide, a precursor for PCP, from an undercover DEA

agent with whom he had been dealing (II Tr. 45-47, 64-65).[1]

The actual manufacturing process took place on February 23, 1978, in Pesci's mobile home (II Tr. 72-73). At approximately 1:30 p.m. on that date, petitioner arrived at the mobile home and entered the trailer carrying a bucket of paste-like material (II Tr. 76; III Tr. 63). Co-defendant Pesci obtained some coffee filters to strain the paste petitioner had brought, and he later helped pour the phenylmagnesium bromide over the paste to make PCP (III Tr. 64). When the process was completed, Pesci testified, petitioner departed, concealing a paper bag containing PCP under his coat (II Tr. 79; III Tr. 65-66). Later that day, petitioner and Pesci were arrested in petitioner's car, which smelled strongly of chemicals (IV Tr. 86). A subsequent search of Pesci's trailer revealed a PCP laboratory in the bathroom and bedroom. A glass jar containing PCP was found in the refrigerator (II Tr. 84-87).

ARGUMENT

1. Petitioner contends (Pet. 17-23) that the district court improperly refused to give the "theory of the defense" instruction proffered by defense counsel and reproduced at pages 15-16 of the petition.

Although a defendant ordinarily is entitled to have the jury instructed regarding his theory of defense, that does not mean that the district court must give

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[1] All three of petitioner's co-defendants pled guilty prior to trial.

whatever instruction the defendant submits that purports to convey the "defense theory." See *Arnold* v. *Horrigan*, 238 F. 39 (6th Cir. 1916); *United States* v. *Wayman*, 510 F.2d 1020 (5th Cir. 1975); *United States* v. *Nevitt*, 563 F.2d 406, 409 (9th Cir. 1977). The instruction petitioner proffered in this case was highly argumentative and rambling;[2] it was in effect a summary of the defense summation, not a "theory" of the defense at all.[3]

Petitioner suffered no prejudice from the district court's failure to give his instruction verbatim, since the legal principles underlying the proffered instruction were adequately covered in the charge actually given. See *Bird* v. *United States*, 180 U.S. 356 (1901); *United States* v. *Blane*, 375 F.2d 249, 252-253 (6th Cir. 1967). Petitioner's first contention was that he was "simply in the wrong place at the wrong time and was therefore arrested and charged." The court covered this theory of defense by instructing the jury (Pet. App. 6a-7a) that

> mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the Defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

[2] Jury instructions are not designed to highlight and summarize the factual assertions of the parties, and they should not be cast in an argumentative form. See *United States* v. *Campanale*, 518 F.2d 352, 362 (9th Cir. 1975); *United States* v. *Martin*, 507 F.2d 428 (7th Cir. 1974); *United States* v. *McCracken*, 488 F.2d 406, 414 (5th Cir. 1974).

[3] The district court explicitly offered to "give a short, succinct, non-argumentative theory of the case" if defense counsel would submit a revised version of his proposed instruction (Pet. App. 5a). Counsel did not do so.

Petitioner's second theory of defense was that Pesci's testimony was false and that he, petitioner, had no part in the illegal scheme. In petitioner's submission, Pesci was an unreliable witness because he was testifying for the prosecution in order to obtain a shorter sentence. In this connection, the district court instructed the jury (Pet. App. 8a):

> Consider also any relationship each witness might bear to either side of the case; the manner in which the witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in this case.
>
> Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. * * *
>
> After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Taken as a whole, the district court's charge adequately presented petitioner's theory of defense to the jury. In light of the improper form of petitioner's proposed instruction, the district court did not abuse its discretion in refusing to give the instruction as submitted.

2. Petitioner further contends (Pet. 23-30) that the government did not present sufficient evidence to convict him of possessing PCP with intent to distribute it.[4]

Contrary to petitioner's assertion, the government introduced sufficient evidence to go to the jury on the question whether petitioner was in constructive possession of the phencyclidine in the refrigerator in the house trailer. The evidence showed that petitioner arrived at the trailer with a bucket of material that was used to produce PCP (II Tr. 76; III Tr. 63-64). He remained in the trailer for approximately two hours, during which time he helped produce the PCP (III Tr. 64). By the time petitioner left the trailer, the strong chemical odor of phenylmagnesium bromide was emanating from the mobile home and could easily be smelled in the street outside (II Tr. 80, 81). In light of this evidence, it was permissible for the jury to reject petitioner's contention that he did not know about the PCP in the trailer and to find that he did have "dominion and control" over the PCP in the refrigerator.

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[4] Petitioner received concurrent five-year sentences on the conspiracy count and the substantive count. Because the possession conviction does not entail any additional sentence, and because, under the Parole Commission's guidelines, it will not result in a lengthier term of imprisonment before eligibility for parole, this Court may properly invoke the concurrent sentence doctrine as a reason for refusing to review petitioner's challenge to the possession conviction. See *Benton* v. *Maryland*, 395 U.S. 784, 788-793 (1969); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *United States* v. *Romano*, 382 U.S. 136, 138 (1965).

Moreover, even if the direct evidence of petitioner's possession of the PCP was insufficient, his conviction on the substantive count should be sustained because possession of PCP was a reasonably foreseeable offense committed by at least one of petitioner's co-defendants in the course of and in furtherance of the conspiracy to which petitioner was a party. See *Pinkerton* v. *United States*, 328 U.S. 640, 645-648 (1946); *United States* v. *Soto*, 591 F.2d 1091, 1100 (5th Cir. 1979). Particularly in light of the vicarious liability of a co-conspirator recognized in *Pinkerton*, there is no basis for petitioner's final suggestion (Pet. 30-31) that even his conspiracy conviction should be reversed because of the alleged error in sending the substantive count to the jury. Petitioner does not challenge the sufficiency of the evidence to support the conspiracy conviction, and there was ample evidence that the PCP in the refrigerator was possessed by someone as part of the conspiracy. That is enough to justify the district court's denial of petitioner's motion for a directed verdict of acquittal on the possession count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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